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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 448.

IN THE MATTER OF
VAN SWERINGEN CORPORATION,
Debtor,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

THE CLEVELAND HOTEL PROTECTIVE COMMITTEE,
J. C. LINCOLN, GORDON MACKLIN, ROBERT H. JAMISON,
MELVIN B. HOTT AND ROY BRENHOLTS,
Individually and as Members of said Committee,
and
THE HENRY GEORGE SCHOOL OF SOCIAL SCIENCE,
Intervening Petitioners,
Petitioners,
vs.
THE NATIONAL CITY BANK OF CLEVELAND,
Successor Trustee,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Respondents.

IN PROCEEDINGS FOR THE REORGANIZATION
OF A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

(*Names of Counsel on inside of Cover.*)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

Robert H. Jamison,
Robert F. Lee,
Guardian Bldg., Cleveland, Ohio,

E. D. McCurdy,
Terminal Tower, Cleveland, Ohio,
Attorneys for Petitioners.

INDEX.

TABLE OF AUTHORITIES.

Cases.

Statute.

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In Proceedings for the Reorganization
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On Petition for Writ of Certiorari
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For the Sixth Circuit.

REPLY BRIEF OF PETITIONERS.

We shall for the purposes of reply thereto group the contentions in the briefs of the debtor (Cleveland Terminals Building Co.) and of the trustee (National City Bank

of Cleveland, Trustee), under the three main points set forth in our petition and main brief.

Point I.

It is essential to confirmation of the plan that it be "fair and equitable" to the land trust certificate holders within the meaning of the Chandler Act, even though integrated into the plan are provisions for lease adjustment.

The first issue is whether the instant reorganization plan, promulgated by virtue of the Chandler Act, is exempt from compliance with Section 221(2) thereof requiring a judicial finding that

"(2) The plan is fair and equitable * * *."

May it be confirmed in the absence of a judicial determination that the plan is, as a matter of law, "fair and equitable" as to the land trust certificate holders?

Both the debtor and the trustee contend the above question should be answered in the affirmative. Their contention necessarily amounts to the position that Section 221(2) affords no protection to the land trust certificate holders, that such a judicial determination is unnecessary (and therefore uncalled for and improper), and *that this kind of a plan can be confirmed even though it is unfair and inequitable to the land trust certificate holders, if the trustee approves the plan.* Indeed, that seems to be the view also of the court below. (R. 835-836.) Of course it follows that if no judicial determination that the plan is "fair and equitable" as to the land trust certificate holders is necessary, then petitioners have no case. We are confident, however, that that is not the law.

Both the debtor and the trustee contend that the decision of the Court in the Milwaukee case (*Group of Investors v. Milwaukee R. Co.,* 318 U. S. 523, 546) justifies exempting this plan from Section 221(2). In addition the debtor

argues that the land trust certificate holders as beneficiaries own "no part" of the property involved, that they have only a claim against the trustee for the net income from the trust (Debtor's brief, 7-10), and finally that petitioners as beneficiaries "have no right to be heard here at all, and that should be the end of the matter." (Debtor's brief, 13.)

1.

The plan does *not* involve simply what respondents call "an adjustment of the lease." *Inseparably integrated into the plan are provisions affecting property rights of the beneficiaries.* The plan involves a method of acquiring ownership of the trust corpus and ownership of the beneficiaries' interest. When the respondents talk about "the treatment" of the debt of $1,100,000 by wiping it out they are talking about the disposition of trust property of which the beneficiaries are the equitable owners. The proposal to cancel the chattel mortgage security of $508,000 would work a disposition of trust property in which the beneficiaries have an equitable ownership. It is in equity the beneficiaries' property, not the trustee's. The plan is in essence one for the liquidation of a trust asset and of the trust, and the amended lease to the debtor's new subsidiary is simply incidental to those objects. The beneficiaries, in short, have definite equitable property rights in the property. In *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, at 114, the Court held that "*All those interested in the estate* are entitled to the court's protection." We are confident that the land trust certificate holders here are entitled to protection under Section 221(2) of the Chandler Act, and that the plan must judicially be found to be "fair and equitable" as to the certificate holders before it can be confirmed, notwithstanding whatever percentage of certificate holders may have been induced by the high-pressure campaign of the trustee to execute consents to the plan. See *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, at 114.

Both respondents rely upon the *Milwaukee* case (318 U. S. 523, at 546) as exempting the land trust certificate holders from the benefit of the "fair and equitable" requirement. Both the debtor (Brief, 12) and the trustee (Brief, 11) quote from that part of the opinion in the *Milwaukee* case wherein, with respect to whether or not the plan in that case was fair and equitable, the court pointed out:

> "The short answer to that objection is that the Terre Haute properties have not been treated by the Commission or the District Court as a part of the properties of the debtor for reorganization purposes. * * * The commission and the District Court considered the problem solely as one of rejection or affirmance of a lease." (318 U. S. 543, 546-547)

However in the instant case the plan itself treats the hotel property as if it *were* an asset of the debtor and the rights of equitable ownership of the beneficiaries in the premises as if they were only liabilities of the debtor—just the opposite of what the Court stated above with respect to the Terre Haute properties in the Milwaukee plan. Turning to Article I of the General Plan of Reorganization of the Building Company (an unnumbered physical exhibit), at page 4 thereof, it is stated as follows:

> "*Assets of The Cleveland Terminals Building Company.*
>
> "The assets of The Cleveland Terminals Building Company consist principally of land, building sites, buildings and leasehold interests situated mainly in the area immediately south and west of the Public Square in the City of Cleveland, Ohio. It *owns* and operates the Terminal Tower, and the *Cleveland Hotel*, Republic, Builders' Exchange, Garage and Midland buildings * * * these buildings were carried on the books of the company at $29,544,914.56, representing their cost * * *."

At pages 6 and 7 of the General Plan the land trust certificates are treated simply as liabilities of the debtor, and the plan refers to them as follows:

"Liabilities of The Cleveland Terminals Building Company.

"The liabilities of The Cleveland Terminals Building Company, including for the purposes of this statement certain certificates hereinafter described in paragraphs 1 and 4, consist of the following: * * *

"4. Fee ownership certificates representing 7,000 shares of equitable ownership in a portion of the premises known as the Cleveland Hotel building site and certain adjoining property, leased to The Cleveland Terminals Building Company under Indenture of Lease dated April 1, 1927, from The Guardian Trust Company, Trustee (The National City Bank of Cleveland, Successor Trustee)." etc.

Thus, contrary to the treatment of the Terre Haute properties in the Milwaukee plan, the main plan in the instant case *does* treat the Cleveland Hotel properties as part of the properties of the debtor for reorganization purposes. For this reason, as well as for the other reasons above set forth, the factual situation presented here is different from that in the *Milwaukee* case with respect to the Terre Haute properties.

2.

The debtor (but not the trustee) argues that the equitable ownership of the land trust certificate holders is not an interest in the property being disposed of by the reorganization plan, that a certificate holder "owns no part of that leasehold," that (instead of a property interest) a certificate holder has only a claim against the trustee. (Debtor's brief, 7.) Further developing that thesis the debtor cavalierly asserts that the land trust certificate holders "have no right to be heard here at all" (Debtor's brief, 13) and that "An order permitting them (certificate holders) to intervene generally would have been erroneous." (Debtor's brief, 10.) These arguments all have for their basis the assumption that the trust beneficiaries have

only an ***in personam*** claim against the trustee for a share of the net income and that the beneficiaries do not have any ownership interest in the trust corpus itself. If it is true that the trust beneficiaries lack any ownership interest or are otherwise not parties affected by the plan—and if the trust beneficiaries have no right to be heard in the reorganization court—then petitioners have no case here for relief. But the debtor's contentions are unsupportable.

Do the land trust certificate holders, as trust beneficiaries, have only a chose in action against the bank trustee, or do they have an equitable interest in the property itself?

In *Senior v. Braden,* 295 U. S. 422,—the only case in this Court we can find involving land trust certificates—the question was whether land trust certificates, with respect to land "some within Ohio, some without," were taxable as personal property by Ohio. It was held that the land trust certificates did not represent merely a chose in action against the trustee but *that the beneficiaries had an interest in the trust land itself.*

The trust indentures in the *Braden* case, which were quite similar to the trust instrument here, included provisions described by the Court (295 U. S., at p. 430) as follows:

> "In each declaration the Trustee undertakes to hold and manage the property for the use and benefit of all certificate owners; to collect and distribute among them the rents; and in case of sale to make *pro-rata* distribution of the proceeds. While certificates and declarations vary in some details, they represent beneficial interests which, for present purposes, are not substantially unlike. Each trustee holds only one piece of land and is free from control by the beneficiaries. They are not joined with it in the management."

To show that the argument made now by the debtor is essentially the same as the argument made by the State

of Ohio in the *Braden* case, we quote the following parts of those two arguments:

Argument of Debtor in This Case

"The certificate holder owns no part of that leasehold. What the certificate holder has is a right to the aliquot share of the income that remains to the landlord after the latter has paid the expenses." (Debtor's brief, 6.)

Argument of State of Ohio in Braden Case

"The State maintains, that * * * 'The rights of the beneficiary consist merely of claims against the various trustees to the *pro rata* distribution of income, during the continuance of the trusts, and to the *pro rata* distribution of the proceeds of a sale of the trust estates upon their termination.' " (295 U. S., 430-431.)

In rejecting that argument in the *Braden* case, the Court through Mr. Justice McReynolds stated (295 U. S., pp. 432-433) as follows:

> "In *Brown v. Fletcher*, 235 U. S. 589, 597, 599, we had occasion to consider the claim that a beneficial interest in a trust estate amounts to a chose in action and is not an interest in the *res*, subject of the trust. Through Mr. Justice Lamar we there said:
>
> " '* * * In either case, and whatever its form, trust property was held by the Trustee,—not in opposition to the *cestui que trust* so as to give him a chose in action, but—in possession for his benefit in accordance with the terms of the testator's will. * * *
>
> " 'The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. * * *'
>
> "The doctrine of *Brown v. Fletcher* is adequately supported by courts and writers. * * * We find no reason for departing from it."

In *Blair v. Commissioner*, 300 U. S. 5, 13, holding that for income tax purposes the transfer of the beneficial interest in a testamentary trust vested the assignee with an equitable interest in the trust property, Mr. Chief Justice Hughes stated (p. 13):

"The will creating the trust entitled the petitioner during his life to the net income of the property held in trust. He thus became the owner of an equitable interest in the corpus of the property. *Brown v. Fletcher,* 235 U. S. 589, 598, 599; *Irwin v. Gavit,* 268 U. S. 161, 167, 168; *Senior v. Braden,* 295 U. S. 422, 432, 433; *Merchants' Loan & Trust Co. v. Patterson,* 308 Ill. 519, 530; 139 N. E. 912. By virtue of that interest he was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach. The interest was present property alienable like any other, in the absence of a valid restraint upon alienation. *Commissioner v. Field,* 42 F. (2d) 820, 822; *Shanley v. Bowers,* 81 F. (2d) 13, 15. The beneficiary may thus transfer a part of his interest as well as the whole. See *Restatement of the Law of Trusts,* Sections 130, 132 *et seq.* The assignment of the beneficial interest is not the assignment of a chose in action but of the 'right, title and estate in and to the property.' *Brown v. Fletcher, supra; Senior v. Braden, supra.* See *Bogert, 'Trusts and Trustees,'* Vol. 1, Sec. 183, pp. 516, 517; 17 *Columbia Law Review,* 269, 273, 289, 290."

Thus the interest of the land trust certificate holders in the Cleveland Hotel premises, and in the $508,000 of mortgage security, and in the lessor's interest in the lease, is that of *equitable ownership of those properties.* It is *their* investment. They—and not the trustee—are the real parties in interest and equitably the real owners of those properties. *We respectfully submit that theirs is an interest intended to be within the protection of Section 221(2) of the Chandler Act.*

We submit, therefore, that the land trust certificate holders *are* entitled to be treated fairly and equitably *in* the reorganization court; and that Section 221(2) of the Chandler Act is not rendered inapplicable because *part* of the plan includes proposed changes of the lease of the trust corpus.

Point II.

The plan is not "fair and equitable" with respect to the land trust certificate holders in that it fails to give the creditor trustee its right of full priority and a participation in the new company equivalent to its contribution thereto.

Looking behind the scenes, it is true, as the debtor emphasizes (Debtor's brief, 2, 23) that "The Cleveland Terminals Building Company" "no longer represents the interests of the original beneficial owners * * *; but *it now represents the interests of the former unsecured creditors of that corporation, who have now become its stockholders and owners.*"

No one ever knew how bankrupt the debtor was. It had general unsecured claims somewhere above $55,000,000 and assets somewhere below 10% of that amount.[1] The debtor (Cleveland Terminals Building Co.) was hopelessly insolvent and all of its stock was "washed out" in the proceedings.[2]

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[1] The District Court made the following finding:

"(d) That the general unsecured claims filed and allowed in the estate of Subsidiary Debtor exceed the sum of $55,000,000.00 as above set forth and that the assets, including property and value in excess of valid liens or pledges thereon, do not presently, and before depreciation, exceed 10% of such indebtedness; that Subsidiary Debtor is therefore insolvent; and accordingly that Van Sweringen Corporation, Debtor herein, and owner of all of the stock of The Cleveland Terminals Building Company, Subsidiary Debtor herein, has no interest in its capacity as a stockholder of Subsidiary Debtor and that its acceptance of the Plan in that capacity is therefore not required." (R. 728.)

[2] In the General Plan of Reorganization of the Building Company (a physical exhibit) in Article I, at page 2, it is set forth:

"The shares of stock of The Cleveland Terminals Building Company (all of which are held by Van Sweringen Corporation through its Trustees appointed in these proceedings), no longer represent any claim or interest in the property of The Cleveland Terminals Building Company, and therefore no provision is made for the holders of such stock in this Plan."

The significance of those facts is, that the plan involves in reality a disposition and liquidation of assets in bankruptcy, more than relief and resuscitation of the business enterprise of the former owner of the corporate debtor. The "management structure" which the debtor argues would be preserved by the plan (Debtor's brief, 24) has already been demolished. As the debtor points out, the term "Subsidiary Debtor" now stands for the former unsecured creditors. **So the two groups interested in the personal property assets of the Cleveland Hotel are (a) on one hand the unsecured creditors, who have a claim upon $138,000 of its property, and (b) on the other hand the land trust certificate holders who through their trustee are equitable owners of the remaining $508,000 of its property by reason of the defaulted chattel mortgage owned by the trust.**

The case is thus reducible to the following situation:

The insolvent corporate debtor has $138,000 of personal property assets which belong to the $55,000,000 of unsecured creditors. It also has mortgaged personal property of $508,000 which belongs equitably to the trust beneficiaries. It has no equity in its lease. Its stock is without value and its stockholder's interest has been wiped out.

The assets of $646,000 are to be transferred to a new company, freed of the unsecured creditors claims of $55,000,000 and freed of the trust mortgage claim of $1,100,000. In order to set those transferred assets to work, the defaulted hotel lease is to be revived, amended and continued, with a new corporation as lessee and operator of the hotel thereafter. *In short, the new company is in substance a new enterprise and is to be the result of the contributions to its capital made by the unsecured creditors* ($138,000) *and the certificate holders* ($508,000). It is at that point that the unfairness and inequitableness of the plan comes in; that the certificate holders are denied in the new company their right of full and absolute priority *in*

assets and earnings; that the certificate holders are denied a participation in the new company equivalent to their proportionate contribution to its capital; that the general creditors, at the expense of the certificate holders, and out of rights which fairly and equitably belong to the certificate holders, are given a participation far beyond their proportionate contribution to the new enterprise, and that the equivalent contribution rule is flagrantly violated.

While the certificate holders are to contribute 78% ($508,000) of the capital of the new company and the unsecured creditors are to contribute only 22% ($138,000) thereof, the unsecured creditors are to receive 100% of the stock of the new company—*all of its equity interest.* It is a flagrant case of giving one creditor group (the unsecured creditors) an undeserved, unfair and inequitable preferred treatment over another creditor group (the certificate holders); and that distribution of the interest in the new enterprise definitely is to the detriment of, and is carved out of the rights which should belong to, the certificate holders.

Neither the debtor nor the trustee has made any attempt to answer the question: Why is it "fair and equitable" that the certificate holders should contribute 78% of the assets of the new company and the unsecured creditors only 22% thereof, yet the unsecured creditors are to receive all of the equity in the new company and in addition will immediately become the owners of 78% of the capital contributed thereto by the certificate holders?

To divert attention from the question of why the unsecured creditors' contribution of 22% should entitle them to 100% of the equity interest, both the debtor and the trustee argue that the certificate holders will acquire *future* benefits from the lease to the new company. We dispute the importance of those so-called benefits; but assuming for the sake of argument that they are important, that *still* does not answer the question: Why does the 22% investment of the unsecured creditors, as against the 78% in-

vestment by the certificate holders, entitle the unsecured creditors to all of the equity in the new enterprise? *What have the unsecured creditors given to justify that? The issue is not alone one of what the trust gets, but also is: What have the unsecured creditors given for what they are to get?*

If the old stockholders of the lessee debtor wanted to come back into the situation, it is settled that they would have to make a fresh contribution and that the participation to be accorded the old stockholders would not be in excess of their contribution in money or in money's worth to the new enterprise.[3]

The rule limiting the participation in a new company of *the old stockholders* of an insolvent corporation to a participation not more than is reasonably equivalent to their contribution in money or in money's worth, applies with equal force, it is submitted, to the participation in the new company to be accorded one *creditor* as against another creditor. *Judged by the equivalent contribution rule, it is unfair, inequitable and constitutes unwarranted preferred treatment to bestow 100% of the stock of the new company on the unsecured creditors, instead of dividing that stock in the ratio of 22%-78% in accordance with the respective contributions of the capital made by the unsecured creditors and the certificate holders.*

So in the first place, the plan is unfair and inequitable because it gives to the unsecured creditors (the Building Company), *immediately,* the 78% of capital assets, valued at $508,000, contributed by the certificate holders (through their trustee).

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[3] In *Case v. Los Angeles Lumber Co.,* 308 U. S. 106, at page 122, Mr. Justice Douglas stated:

"In view of these considerations we believe that to accord 'the creditor his full right of priority against the corporate assets' where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."

Equitable distribution of the capital stock of the new company on a 22%-78% basis, in accordance with the 22%-78% capital contributions, would necessarily carry with it a 22%-78% division of the earnings of the new enterprise. The certificate holders in that case would be entitled as of right to 78% of the earnings, as earnings. Bearing in mind that the certificate holders should equitably already be entitled under the plan to 78% of the earnings, it immediately becomes apparent how flimsy is the argument of the trustee that the unsecured creditors are giving up something to the certificate holders (a) because at the start of the plan (but not after there are less than 7,000 certificates outstanding) 50% of the net earnings would go to the certificate holders as additional rent, (b) because the other 50% of the net earnings would be used to buy up the trust certificates for the benefit of the unsecured creditors, and (c) because dividends payable to the unsecured creditors on the new stock will be postponed until the earnings have been sufficient to retire one-half of the certificates (Trustee's brief, 17, 18).[4]

The certificate holders, in accordance with their capital contribution, should be entitled to 78% of the net earnings, and not to a maximum of 50%; and the certificate holders are entitled to receive those earnings *as earnings,* instead of having the income from their own property used to buy out their certificates.

A further word about the additional rental which at its maximum of 50% still amounts to less than 78% of such earnings:

---

[4] The trustee almost frantically reiterates that the unsecured creditors (the Building Company) derive no income *in cash* from their 100% stock ownership until after the earnings have retired one-half of the trust certificates—it refers to that fact *eight* times at pages 18-21 of its brief. The fact is that the unsecured creditors are receiving earnings every time a certificate is purchased, for such purchase constitutes an investment of the earnings in the purchase of part of the hotel premises. They are simply receiving the benefit of those earnings *in property* instead of in cash.

(a) When there are 7,000 certificates outstanding, the yearly earnings before payment of fixed rent are to go as follows: (1) $175,000 for fixed rent, (2) 50% of the net earnings remaining thereafter go to the certificate holders as additional rent, and (3) the other 50% of the net earnings are used to buy out certificates. *As fast as each of the 7,000 certificates are thus retired, both the fixed rent of $175,000 and the 50% of the net earnings payable as additional rent for the next year are reduced by 1/7000th for each retired certificate.* It begins to snowball. (The certificate holders thus bought out will never share in any *additional* rentals, nor, of course, in any further earnings.)

(b) When there has been a reduction to 5,000 certificates, (1) the fixed rental then becomes 5000/7000ths of $175,000, or only $125,000 a year, (2) the proportion or net earnings going as additional rental drops to 5000/7000ths of 50% of the net earnings, so now only 35.7% of the net earnings go as additional rent, and (3) the remaining portion of the net earnings, 64.3%, are invested for the Building Company in the purchase of trust certificates. As both the debtor and the trustee point out, the operation of the hotel during the war years has resulted in a substantial profit, so that *a substantial number of certificates will be immediately retired if the plan goes into effect.*

(c) When the certificates have been reduced to 3,500, or half of their present number, a number of things will happen:

(1) The fixed rental becomes $87,500 per year, or one-half of what it is at the start of the plan.

(2) The lessee thereafter pays only 25% of the net earnings as additional rental. (R. 137.)

(3) The lessee thereafter uses only 25% of the net earnings to buy in certificates. (R. 138-139.)

(4) The pledge of the new company's stock is ended and it gets it back. (R. 146.)

(5) The lessee retains 50% of the net earnings thereafter.

That is how the plan works. **The key to it is that it appropriates the bulk of the earnings of the new company for use in buying out the trust certificates for the benefit of the unsecured creditors (the Building Company), to the end that the unsecured creditors may ultimately become the owners of the entire premises, "lock, stock and barrel." Earnings which should belong to the certificate holders in their own right are thus to be used to buy out their interest (not the unsecured creditors' interest).**

The portion of the net earnings going to the trustee as additional rent at no time amounts to 78% and is never higher than 50% and immediately (upon the initial retirement of certificates) drops downward. It is therefore simply not true that the plan gives the certificate holders "an equitable participation in the earnings" for it never amounts to 78% thereof. On the other hand the plan gives the unsecured creditors (the Building Company) an unfair and inequitable participation in the earnings in that for their 22% capital distribution they receive as their share of the earnings an amount upward from 50% to 100% thereof.

Both the debtor and the trustee present computations setting forth what the certificate holders would receive under the plan with respect to the first 18 months of its operation. (Trustee's brief, 19-21; Debtor's brief, 19-20.) The trustee states that those net earnings were $553,400, of which $276,700 would go as additional rent; the debtor's figure is $272,553. Taking the trustee's figure of $553,400, the trustee fails to point out that if the certificate holders are given their proper 78% share of the earnings they would receive not $276,700 but $431,651,—which is quite a difference, $154,952. So on the basis of the trustee's own figures for the first 18 months of the operation under the plan, $154,952 of the earnings would be taken from the

certificate holders and applied for the benefit of the unsecured creditors (the Building Company), *which would immediately more than completely repay them for their initial investment of $138,000 in the enterprise.* To say that the plan is "very favorable" to the certificate holders is therefore to be blind to the fact that it robs them of their right to 78% of the *earnings*, as well as robs them of their ownership of 78% of the *capital assets* of the new company.

We earnestly submit, therefore, that the plan is unfair and inequitable to the land trust certificate holders for it deprives them of their equitable right to 78% of the capital stock and the earnings of the new company for their contribution of 78% of the capital and instead, at the expense of the certificate holders, immediately gives the unsecured creditors (the Building Company) 100% of the capital assets of the new company (as represented by the new stock), and thereafter gives the unsecured creditors an inequitable share upward from 50% to 100% of the earnings from the joint contribution of capital made by the certificate holders and the unsecured creditors. It does violence to the rule enunciated in *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, that participation must be commensurate with the contribution made in money or in money's worth. It constitutes a departure from the decisions of this Court from *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, to *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, and *Consolidated Rock Co. v. Dubois*, 312 U. S. 510. Yet is has been sanctioned by the Sixth Circuit Court of Appeals. It is not only unfair and inequitable in this case, but, unless modified by this Court, will stand as a dangerous precedent in future reorganization cases.

The situation is *not* one of "demolishing the existing management structure," as the debtor says (Brief, 24). *That structure no longer exists anyhow.* It was based upon the ownership of all of the stock of the debtor (the Building

Company) by the principal debtor, Van Sweringen Corporation, and ended when all of the stock of the debtor was given by the plan to its unsecured creditors. The certificate holders (through the trustee) for their 78% contribution to the capital of the new company are entitled, through stock ownership, to a 78% voice in the management of the new company, instead of giving to the unsecured creditors (through the Building Company) a 100% voice in the management in return for their 22% contribution. Likewise the case is not one of benevolently permitting the owner of the debtor (the Building Company) at the time the reorganization petition was filed, "an opportunity eventually to earn the right to own the property" (See Debtor's brief, 17); for, as the brief of defendant itself concedes (p. 2), "The term 'Subsidiary Debtor' * * * now represents the interests of the former unsecured creditors of that corporation, who have now become its stockholders and owners." Instead, it is a case, if the plan remains unmodified, of giving the unsecured creditors an excellent speculative chance, through ownership of the equity in the new company, of owning the property of the certificate holders, and, indeed, of giving the unsecured creditors to start with a gift of $508,000 of the certificate holders' property.

Upon recognition of the fact that the plan should provide a treatment of the certificate holders equal with that given the unsecured creditors as to the equity in the enterprise and therefore that the equity in the enterprise should be divided 78% to the certificate holders and 22% to the general creditors, the modification necessary to make the plan fair and equitable is simple. All that is required is an order directing that approximately 78% of the stock of the new company be distributed to the trustee for redistribution among the certificate holders, and that the remaining 22% of the stock be distributed to the unsecured creditors (the Building Company). That would constitute, and only that

would constitute, a fair division of the ownership of the capital and the earnings of the new enterprise.

The trustee, notwithstanding its active advocacy and support of the position of the debtor in this litigation is scarcely in a position to oppose that modification.

The brief on behalf of the Building Company (the unsecured creditors) expressly states that the new lease is "fair." It calls it "A *fair* new lease." (Debtor's brief, 24.) Upon a redistribution of the 78% block of the stock among the certificate holders at the rate of, say, one share of stock for each certificate, the certificate holders will then be possessed of their rightful equity in the new company in recognition of their 78% contribution to its capital, just as the unsecured creditors (through the Building Company) will be possessed of 22% of that stock for their 22% contribution to the new company's assets. Thereafter, as the certificates are retired from the earnings of the enterprise, the certificate holders will, through their ownership of one share of stock per certificate, retain their equity in the enterprise.

No other modification of the plan than the foregoing is necessary under the circumstances in order to make it fair and equitable, and to be worthy of confirmation. Clearly the courts have jurisdiction to so modify the plan, both under the Chandler Act and under Article VIII, Section VIII (pp. 45-46), of the General Plan of Reorganization of the Building Company. Clearly, fairness and equity to the land trust certificate holders require that the plan be so modified.

Point III.

The Circuit Court of Appeals erred in sanctioning the refusal to permit the petitioning land trust certificate holders and their Committee to intervene in the proceedings and in ruling that the certificate holders had no right to participate in what it called "the problem of adjustment."

If the land trust certificate holders are not entitled to be protected in a reorganization court against a plan which is not "fair and equitable" as required by Section 221(2) of the Chandler Act, then they have not been prejudiced by the refusal of the District Court to permit petitioners to intervene for they would have no rights in that court anyhow. We submit, however, that petitioners did have rights which were entitled to be protected in that reorganization court and that they were entitled to be admitted as parties in that court in order to assert and properly defend those rights. No one else was there asserting those rights on petitioners' behalf—even their trustee was committed from the start to acceptance of the plan for reasons which on the surface we cannot understand. And obviously the corporate debtor (which is now a front for the unsecured creditors) was eager to have the plan approved. In short no *official* opposition to the plan was permitted. Judicial discretion must always be exercised with reference to the facts upon which it is based. It clearly was an abuse of discretion to exclude all land trust certificate holders as parties. The right to be heard in opposition to confirmation of the plan carries with it the right to seek a review of such confirmation by appeal. Prejudice from that ruling arises where in consequence of that wrongful refusal the certificate holders are prevented from appealing and a plan which is unfair and inequitable as to them is permitted to remain confirmed. If, therefore, the plan is unfair and inequitable as to the certificate holders, as petitioners contend, the denial to them of the right to

appeal establishes the existence of prejudice from such erroneous ruling.

CONCLUSION.

For the reasons set forth in petitioners' petition, main brief and this reply brief, we respectfully submit that the Circuit Court of Appeals has erred in its decision in this case, that it has both "decided a Federal question in a way probably in conflict with applicable decisions of this Court" and has "decided an important question of Federal law which has not been, but should be, settled by this Court"; and that the case is, therefore, one calling for the granting of a writ of certiorari and thereafter reviewing and either reversing or modifying said decision in the respects hereinabove contended.

Respectfully submitted,

Robert H. Jamison,
Robert F. Lee,
E. D. McCurdy,
Attorneys for Petitioners.